

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUAH MCCAIVITT,  
Petitioner,  
v.  
PATRICK COVELLO,  
Respondent.

No. 2:21-cv-00774 KJM KJN P

ORDER AND FINDINGS &  
RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his February 7, 2014 conviction for second degree murder and gross vehicular manslaughter. Petitioner was sentenced to an indeterminate term of 15 years to life in state prison, plus a consecutive determinate term of two years for an out-on-bail enhancement. Petitioner raises the following claims in his petition: (1) insufficient evidence to support his conviction; (2) a Miranda violation; (3) illegal search and seizure under the Fourth Amendment; (4) the government violated its duty to preserve evidence; (5) the criminal statutes are unconstitutionally vague; (6) ineffective assistance of counsel; (7) judicial bias; (8) prosecutorial misconduct; and (9) cruel and unusual punishment. (ECF Nos. 1 & 8.) After careful review of the record, this Court concludes that the petition should be denied. This Court also orders that petitioner's request for judicial notice be denied. (ECF No. 30.)

1 II. Procedural History

2 On February 7, 2014, a jury found petitioner guilty of second degree murder (Cal. Penal  
3 Code, sec. 187, subd. (a)) and gross vehicular manslaughter while intoxicated (Cal. Penal Code,  
4 sec. 191.5, subd. (a)). (ECF No. 27-2 at 80-81.) Before the jury reached a verdict, petitioner  
5 admitted the special allegation that he had been released on bail when he committed the offense  
6 pursuant to Cal. Penal Code section 12022.1. On April 7, 2014, petitioner was sentenced to 17  
7 years to life in state prison. (ECF No. 27-2 at 193-95.)

8 Petitioner appealed the conviction to the California Court of Appeal, Third Appellate  
9 District. The Court of Appeal affirmed the conviction on December 2, 2016. (ECF No. 27-11.)

10 In September 2019, the El Dorado County Superior Court denied petitioner's petition for  
11 resentencing. (ECF No. 27-14.) He appealed, and the California Court of Appeal affirmed the  
12 order. (ECF No. 27-24.)

13 Petitioner filed a petition for review in the California Supreme Court, which the court  
14 denied on June 22, 2018. (ECF No. 27-13.) Petitioner then filed a petition for review regarding  
15 sentencing issues. (ECF No. 27-25.) The California Supreme Court granted review but deferred  
16 ruling on the issue until disposition of a related issue in People v. Lewis, S260598. (ECF No. 27-  
17 26.) The California Supreme Court later dismissed the matter. (ECF No. 27-27.)

18 Petitioner filed a state habeas petition in El Dorado County Superior Court, and the court  
19 denied the petition. (ECF No. 27-28.) He filed a petition in the California Court of Appeal,  
20 which was also court summarily denied. (ECF Nos. 27-29 & 27-30.) Petitioner filed state habeas  
21 petitions in the California Supreme Court, and the court denied the petitions. (ECF Nos. 27-31 to  
22 27-38.)

23 Petitioner filed the instant petition on October 28, 2020. (ECF No. 1; see also ECF No.  
24 8.) Respondent filed an answer on December 22, 2021. (ECF No. 24.) On February 3, 2022,  
25 petitioner filed a declaration in support of his reply and a request for judicial notice. (ECF No.  
26 30.)

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1 III. Facts<sup>1</sup>

2 After independently reviewing the record, this Court finds the state appellate court's  
3 summary accurate and adopts it herein. In its unpublished memorandum and opinion affirming  
4 petitioner's judgment of conviction on appeal, the California Court of Appeal provided the  
5 following factual summary:

6 In September 2012, defendant left the Rusty Nail Saloon in Pollock  
7 Pines around 10:00 p.m. in his Chevy pickup and headed westbound  
8 on Pony Express Trail toward his home that was located between  
9 Placerville and Coloma. While defendant apparently had only one  
10 beer at the Rusty Nail, he had "a couple" beers at another bar a short  
11 distance away, the Pine Lodge Club, before heading to the Rusty Nail  
12 for his final beer of the night. He also had "two to three" beers at  
another bar in Placerville, the Liars' Bench, before that. In addition  
to the alcohol, defendant's system also contained  
tetrahydrocannabinol (THC), the principal psychoactive constituent  
of marijuana, and alprazolam, a benzodiazepine sold under the  
proprietary name Xanax, both of which add to the intoxicating effects  
of alcohol.

13 Meanwhile, Denise Caldwell and her husband, Scott, were driving  
14 eastbound on Pony Express Trail in separate vehicles. They were  
15 heading to their home in Cedar Grove after meeting in Rancho  
16 Cordova for dinner earlier in the night. Caldwell was driving a  
17 Subaru; her husband followed in a pickup truck about 50 yards  
18 behind. As Caldwell led their homebound caravan into a curve in the  
19 roadway at a speed of 10 to 15 miles per hour, Scott heard a "horrific  
20 noise" that sounded like an explosion, saw a cloud of smoke in front  
21 of him, and pulled his truck over to the side of the road. The sound  
Scott heard was his wife's Subaru being impacted head on by  
defendant's Chevy truck as it came around the curve in the opposite  
direction. The force of the collision and height difference between  
the vehicles caused the Chevy to drive over the front of the Subaru  
and embed itself into the front cabin where Caldwell was seated,  
driving the Subaru backward, spinning the entangled vehicles  
perpendicular to the roadway, and then flipping them upside down,  
Subaru on top of Chevy. Caldwell was killed nearly instantly.

22 Two El Dorado County Sheriff's deputies happened to be parked in  
23 their patrol cars about 150 yards away. Hearing what they also  
24 described as an explosion, they immediately drove to the crash site.  
25 Defendant was crawling out of his truck when they arrived.  
26 Caldwell's husband, who had run to the wreckage to find his wife's  
lifeless body upside down in the Subaru, was screaming and  
appeared to be in shock. He lunged at defendant and had to be  
restrained by one of the deputies. Defendant, who smelled of alcohol,

27 <sup>1</sup> The facts are taken from the opinion of the California Court of Appeal for the Third Appellate  
28 District in People v. McCavitt, No. C076173, 2016 WL 7030360 (Cal. App. Ct. Dec 2, 2016), a  
copy of which was lodged by respondent as ECF No. 27-11.

1 was taken to one of the patrol cars by the other deputy.

2 CHP officers and emergency medical personnel arrived a short time  
3 later. After defendant was checked out by an emergency medical  
4 technician, he was advised of his *Miranda*<sup>1</sup> rights and questioned by  
5 CHP Officer Ian Hoey, who also noted defendant smelled of alcohol.  
6 Defendant claimed he was heading home from Placerville. When  
7 Officer Hoey pointed out defendant was actually heading toward  
8 Placerville from farther east, defendant briefly argued with the  
9 officer and then maintained he was heading home regardless of the  
10 direction. Defendant also claimed he had one beer two or three hours  
11 before the collision at a bar in Pollock Pines or Cedar Grove. When  
12 the officer explained that was near where they currently were,  
13 defendant appeared to be confused. Observing signs of intoxication,  
14 Officer Hoey administered a field sobriety test that also indicated  
15 defendant was intoxicated. Two preliminary alcohol screening (PAS)  
16 tests, administered four minutes apart, revealed a blood alcohol  
17 content of 0.118 percent and 0.12 percent, respectively.

18 Defendant was arrested and transported to the hospital to be  
19 medically cleared before being taken to jail. Officer Hoey  
20 accompanied defendant during the ride to the hospital. In the  
21 ambulance, defendant admitted to “drinking more” than the one beer,  
22 although the officer did not say how much more. Defendant also  
23 admitted to smoking marijuana earlier in the night. A blood sample  
24 taken at the hospital an hour after the collision was tested for the  
25 presence of alcohol, revealing defendant’s blood alcohol content was  
26 0.12 percent at the time of the blood draw and might have been as  
27 high as 0.14 percent at the time of the collision due to the fact alcohol  
28 is eliminated from the bloodstream at an average rate of 0.02 percent  
per hour. As previously mentioned, defendant’s blood also contained  
THC and alprazolam.

1 An analysis of the forensic evidence at the crash site revealed  
2 defendant’s Chevy entered the curve where the crash occurred at  
3 about 57 miles per hour, faster than the posted speed limit of 45 miles  
4 per hour and nearly double the safe speed for taking that particular  
5 curve, causing one of the truck’s tires to scuff the roadway. The  
6 location of the scuff mark revealed defendant’s Chevy was  
7 completely in Caldwell’s lane as he came around the curve. In an  
8 apparent attempt to avoid the collision, Caldwell slowed her Subaru  
9 to about 4 miles per hour and moved it to the outside of her lane just  
10 before impact. Defendant’s Chevy also slowed, but only to about 50  
11 miles per hour. Impact was head on, but slightly off center. As  
12 mentioned, the Chevy essentially drove over Caldwell’s Subaru,  
13 embedding itself into the front cabin and driving the Subaru  
14 backward as the entangled vehicles spun around and flipped over,  
15 causing Caldwell’s death.

16 (ECF No. 27-11 at 3-6.)

#### 17 IV. Standards for a Writ of Habeas Corpus

18 An application for a writ of habeas corpus by a person in custody under a judgment of a

1 state court can be granted only for violations of the Constitution or laws or treaties of the United  
 2 States. 28 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation  
 3 or application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire,  
 4 502 U.S. 62, 67-68 (1991).

5 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas corpus  
 6 relief:

7 An application for a writ of habeas corpus on behalf of a person in  
 8 custody pursuant to the judgment of a State court shall not be granted  
 9 with respect to any claim that was adjudicated on the merits in State  
 court proceedings unless the adjudication of the claim -

10 (1) resulted in a decision that was contrary to, or involved an  
 11 unreasonable application of, clearly established Federal law, as  
 determined by the Supreme Court of the United States; or

12 (2) resulted in a decision that was based on an unreasonable  
 13 determination of the facts in light of the evidence presented in the  
 State court proceeding.

14 28 U.S.C. § 2254(d).

15 For purposes of applying § 2254(d)(1), “clearly established Federal law” consists of  
 16 holdings of the Supreme Court at the time of the last reasoned state court decision. Thompson v.  
 17 Runnels, 705 F.3d 1089, 1096 (9th Cir. 2013) (citing Greene v. Fisher, 132 S. Ct. 38, 44-45  
 18 (2011)); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citing Williams v. Taylor, 529 U.S.  
 19 362, 412 (2000)). Circuit court precedent “may be persuasive in determining what law is clearly  
 20 established and whether a state court applied that law unreasonably.” Stanley, 633 F.3d at 859  
 21 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir. 2010)). However, circuit precedent may  
 22 not be “used to refine or sharpen a general principle of Supreme Court jurisprudence into a  
 23 specific legal rule that th[e] [Supreme] Court has not announced.” Marshall v. Rodgers, 133 S.  
 24 Ct. 1446, 1450 (2013) (citing Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012) (per curiam)).  
 25 Nor may it be used to “determine whether a particular rule of law is so widely accepted among  
 26 the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be accepted as correct.”  
 27 Id. Further, where courts of appeals have diverged in their treatment of an issue, there is no  
 28 “clearly established federal law” governing that issue. See Carey v. Musladin, 549 U.S. 70, 77

1 (2006).

2 A state court decision is “contrary to” clearly established federal law if it applies a rule  
3 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court  
4 precedent on “materially indistinguishable” facts. Price v. Vincent, 538 U.S. 634, 640 (2003).  
5 Under the “unreasonable application” clause of § 2254(d)(1), “a federal habeas court may grant  
6 the writ if the state court identifies the correct governing legal principle from [the Supreme  
7 Court’s] decisions, but unreasonably applies that principle to the facts of the prisoner’s case.”<sup>2</sup>  
8 Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (quoting Williams, 529 U.S. at 413); see also Chia v.  
9 Cambra, 360 F.3d 997, 1002 (9th Cir. 2004). In this regard, “a federal habeas court may not issue  
10 the writ simply because that court concludes in its independent judgment that the relevant state-  
11 court decision applied clearly established federal law erroneously or incorrectly. Rather, that  
12 application must also be unreasonable.” Williams, 529 U.S. at 411; see also Schriro v. Landrigan,  
13 550 U.S. 465, 473 (2007); Lockyer, 538 U.S. at 75 (“It is not enough that a federal habeas court,  
14 in its ‘independent review of the legal question,’ is left with a “‘firm conviction’” that the state  
15 court was “‘erroneous’”). “A state court’s determination that a claim lacks merit precludes  
16 federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state  
17 court’s decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v.  
18 Alvarado, 541 U.S. 652, 664 (2004)). Accordingly, “[a]s a condition for obtaining habeas corpus  
19 from a federal court, a state prisoner must show that the state court’s ruling on the claim being  
20 presented in federal court was so lacking in justification that there was an error well understood  
21 and comprehended in existing law beyond any possibility for fair-minded disagreement.” Id. at  
22 103.

23 If the state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing  
24 court must conduct a de novo review of a habeas petitioner’s claims. Delgadillo v. Woodford,  
25 527 F.3d 919, 925 (9th Cir. 2008); see also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008)

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26 <sup>2</sup> Under § 2254(d)(2), a state court decision based on a factual determination is not to be  
27 overturned on factual grounds unless it is “objectively unreasonable in light of the evidence  
28 presented in the state court proceeding.” Stanley, 633 F.3d at 859 (quoting Davis v. Woodford,  
384 F.3d 628, 638 (9th Cir. 2004)).

1 (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because of  
2 § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by  
3 considering de novo the constitutional issues raised.”).

4 The court looks to the last reasoned state court decision as the basis for the state court  
5 judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).  
6 If the last reasoned state court decision adopts or substantially incorporates the reasoning from a  
7 previous state court decision, this court may consider both decisions to ascertain the reasoning of  
8 the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). “When a  
9 federal claim has been presented to a state court and the state court has denied relief, it may be  
10 presumed that the state court adjudicated the claim on the merits in the absence of any indication  
11 or state-law procedural principles to the contrary.” Richter, 562 U.S. at 99. This presumption  
12 may be overcome by a showing “there is reason to think some other explanation for the state  
13 court’s decision is more likely.” Id. at 99-100. Similarly, when a state court decision on  
14 petitioner’s claims rejects some claims but does not expressly address a federal claim, a federal  
15 habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the  
16 merits. Johnson v. Williams, 568 U.S. 289, 298-301 (2013) (citing Richter, 562 U.S. at 98). If a  
17 state court fails to adjudicate a component of the petitioner’s federal claim, the component is  
18 reviewed de novo in federal court. See, e.g., Wiggins v. Smith, 539 U.S. 510, 534 (2003).

19 Where the state court reaches a decision on the merits but provides no reasoning to  
20 support its conclusion, a federal habeas court independently reviews the record to determine  
21 whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v.  
22 Thompson, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is not de novo  
23 review of the constitutional issue, but rather, the only method by which we can determine whether  
24 a silent state court decision is objectively unreasonable.” Himes, 336 F.3d at 853. Where no  
25 reasoned decision is available, the habeas petitioner has the burden of “showing there was no  
26 reasonable basis for the state court to deny relief.” Richter, 562 U.S. at 98.

27 A summary denial is presumed to be a denial on the merits of the petitioner’s claims.  
28 Stancle v. Clay, 692 F.3d 948, 957 & n.3 (9th Cir. 2012). While the federal court cannot analyze



1 just what the state court did when it issued a summary denial, the federal court reviews the state  
2 court record to “determine what arguments or theories . . . could have supported the state court’s  
3 decision; and then it must ask whether it is possible fairminded jurists could disagree that those  
4 arguments or theories are inconsistent with the holding in a prior decision of [the Supreme]  
5 Court.” Richter, 562 U.S. at 101. It remains the petitioner’s burden to demonstrate that ‘there  
6 was no reasonable basis for the state court to deny relief.’” Walker v. Martel, 709 F.3d 925, 939  
7 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98).

8 When it is clear, however, that a state court has not reached the merits of a petitioner’s  
9 claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal  
10 habeas court must review the claim de novo. Stanley, 633 F.3d at 860 (citing Reynoso v.  
11 Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006)).

#### 12 V. Petitioner’s Claims

13 As a threshold matter, respondent argues that many of petitioner’s claim are procedurally  
14 barred because of the contemporaneous objection rule or petitioner’s failure to raise them on  
15 direct appeal. (ECF No. 24 at 25-28.) Although procedural issues are often addressed before the  
16 merits, they need not be. The Supreme Court in Lambrix v. Singletary, 520 U.S. 518 (1997)  
17 skipped over the procedural bar argument and proceeded to the merits. Id. at 525 (“Despite our  
18 puzzlement at the Court of Appeals’ failure to resolve this case on the basis of procedural bar, we  
19 hesitate to resolve it on that basis ourselves.”); see also Franklin v. Johnson, 290 F.3d 1223, 1232  
20 (9th Cir. 2002) (stating that courts may “reach the merits of habeas petitions if they are, on their  
21 face and without regard to any facts that could be developed below, clearly not meritorious  
22 despite an asserted procedural bar.”). “Procedural bar issues are not infrequently more complex  
23 than the merits issues” and “it may well make sense in some instances to proceed to the merits if  
24 the result will be the same.” Franklin, 290 F.3d at 1232; see, e.g., Dean v. Schriro, 371 F. App’x  
25 751 (9th Cir. 2010). Because these claims can be resolved on the merits, this Court declines to  
26 decide whether a procedural bar precludes petitioner from obtaining habeas relief.

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1           A. Insufficient Evidence (Claim One)

2           Petitioner claims that there was insufficient evidence to support his conviction in several  
 3 ways: (1) the accident reconstruction expert, Mr. Robert Snook, relied exclusively on Officer  
 4 Nett’s written report; (2) the photographs of a single abrasion did not match either vehicle; (3)  
 5 there are conflicting reports regarding the speed of the victim’s car at the time of impact; (4) there  
 6 is no signature on petitioner’s prior DUI plea form; (5) there is no evidence that petitioner crossed  
 7 a double yellow line prior to the accident; and (6) there is no evidence that petitioner received a  
 8 “Watson” advisement pursuant to California Vehicle Code section 23593. (ECF No. 19-20.) In  
 9 response, respondent argues that these claims were either unsupported by the record or required  
 10 the state court to improperly draw inferences favorable to petitioner. (ECF No. 24 at 16.) Either  
 11 way, the state court reasonably rejected petitioner’s insufficient evidence claim, contends  
 12 respondent. The California Supreme Court summarily rejected petitioner’s claim.

13           A petitioner is entitled to habeas corpus relief on a sufficiency of the evidence claim, “if it  
 14 is found that upon the record evidence adduced at the trial no rational trier of fact could have  
 15 found proof of guilt beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 324 (1979);  
 16 see also Ngo v. Giurbino, 651 F.3d 1112, 1115 (9th Cir. 2011). This inquiry involves two steps.  
 17 First, the federal court must review the evidence in the light most favorable to the prosecution.  
 18 Jackson, 443 U.S. at 319. If there are conflicting factual inferences, the federal court must  
 19 presume the jury resolved the conflicts in favor of the prosecution. Id. at 326 (“[A] federal  
 20 habeas corpus court faced with a record of historical facts that supports conflicting inferences  
 21 must presume—even if it does not affirmatively appear in the record—that the trier of fact  
 22 resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”);  
 23 McDaniel v. Brown, 558 U.S. 120, 133 (2010) (per curiam). Second, the federal court will  
 24 “determine whether the evidence at trial, including any evidence of innocence, could allow *any*  
 25 rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.”  
 26 United States v. Nevils, 598 F.3d 1158, 1165 (9th Cir. 2010) (en banc).

27           Although this Court’s review is grounded in due process under the Fourteenth  
 28 Amendment, the Jackson standard “must be applied with explicit reference to the substantive

elements of the criminal offense as defined by state law.” Jackson, 443 U.S. at 324 n.16; Juan H. v. Allen, 408 F.3d 1262, 1275-76 (9th Cir. 2005). This Court will look to state law to establish the elements of the offense and then turn to the federal question of whether the state court was objectively unreasonable in concluding that sufficient evidence supported that conviction. See Johnson v. Montgomery, 899 F.3d 1052, 1056 (9th Cir. 2018).

“After AEDPA, we apply the standards of *Jackson* with an additional layer of deference.” Juan H., 408 F.3d at 1274; see Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam). On direct appeal at the state level, “it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.” Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam). On habeas review, “a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was ‘objectively unreasonable.’” Id. (quoting Renico v. Lett, 559 U.S. 766, 773 (2010)).

Petitioner was convicted of gross vehicular manslaughter while intoxicated, which California law defines as

[T]he unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.

Cal. Penal Code § 191.5(a). California Vehicle Code section 23153(a) states that it is “unlawful for a person, while under the influence of any alcoholic beverage, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.” Additionally, California Vehicle Code section 23153(b) provides that it is “unlawful for

1 a person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a  
2 vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in  
3 driving the vehicle, which act or neglect proximately causes bodily injury to any person other  
4 than the driver.”

5 Here, the state court could have reasonably determined that there was sufficient evidence  
6 to support petitioner’s conviction. Petitioner’s six arguments are based on inaccurate  
7 recollections of the record or an attempt to recast the evidence in his favor. First, he claims that  
8 Mr. Snook improperly based his opinion solely on Officer Nett’s written report. But at trial, Mr.  
9 Snook testified that he reviewed the traffic collision report by Officer Nett in addition to the  
10 actual traffic collision report by Officer Hoey, photographs taken by CHP officers, both vehicles,  
11 and conducted his own dynamics analysis. (See, e.g., ECF No. 27-5 at 93-98.) Second, Mr.  
12 Snook also found that there were matching abrasions on both vehicles at the place of impact. (Id.  
13 at 152.) Third, in terms of the speed of the victim’s car at the time of impact, Mr. Snook  
14 determined that her car was traveling about 4 miles per hour, id. at 157, and her husband  
15 estimated that she was driving “10, 15 miles an hour,” ECF No. 27-3 at 74. See Brown, 558 U.S.  
16 at 133 (stating that a federal habeas court must view the evidence in a light most favorable to the  
17 prosecution, including resolving any conflicting evidence in their favor). Fourth, petitioner also  
18 claims that the prior DUI form was unreliable because it was unsigned. Yet he ignores the other  
19 evidence admitted at trial that supports his prior DUI conviction, including his own stipulation  
20 that he attended a DUI education class in Hawaii. (See, e.g., ECF No. 27-2 at 131-33; ECF No.  
21 27-5 at 35-39, 41-43.) Fifth, despite claiming that there is no evidence that petitioner’s vehicle  
22 crossed the double yellow line, Mr. Snook testified that the tire scuff mark and the collision  
23 occurred in the “eastbound lane, the opposite lane that [petitioner] was going.” (ECF No. 27-5 at  
24 123; see also id. at 150.) Lastly, Ms. Cigelske, a senior motor vehicle tech at the Department of  
25 Motor Vehicles, testified that petitioner signed a form notifying him that if he drives under the  
26 influence of alcohol and a person is killed, he could be charged with murder. (ECF No. 27-6 at  
27 34-37.) Based on an independent review of the record, this Court concludes that the state court’s  
28 decision was not contrary to, or an unreasonable application of, clearly established Supreme

1 Court authority and recommends denying relief on this claim.

2 B. Miranda Claim (Claim Two)

3 Petitioner claims that his statements to the police were not made voluntarily, knowingly,  
4 or intelligently because he made them after a traumatic brain injury, while he was intoxicated, and  
5 did not know his location. (ECF No. 1 at 20-21.) In response, respondent argues that the state  
6 court reasonably rejected petitioner's Miranda claim; petitioner fails to show that he was coerced,  
7 misled by the officers, or that his statements were involuntary. (ECF No. 24 at 16.)

8 Before trial, petitioner's counsel filed a motion in limine to exclude his statements to the  
9 officer. (ECF No. 27-1 at 84-86.) The trial court held a hearing on the issue and concluded that  
10 petitioner "responded to the officer's questions, said that he understood all of his rights and was  
11 waiving his rights. So I'm going to allow it." (ECF No. 27-3 at 44.) The California Supreme  
12 Court also summarily rejected petitioner's claim.

13 The Supreme Court has held that "the prosecution may not use statements, whether  
14 exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it  
15 demonstrates the use of procedural safeguards effective to secure the privilege against self-  
16 incrimination." Miranda v. Arizona, 384 U.S. at 436, 444 (1966). "Prior to any questioning, the  
17 person must be warned that he has a right to remain silent, that any statement he does make may  
18 be used as evidence against him, and that he has a right to the presence of an attorney, either  
19 retained or appointed." Id.

20 A person may voluntarily, knowingly, and intelligently waive these rights. Id.; see also  
21 Oregon v. Elstad, 470 U.S. 298, 309 (1985). This inquiry involves two steps. First, waiver is  
22 voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion,  
23 or deception." Moran v. Burbine, 475 U.S. 412, 421 (1986). Second, "the waiver must have been  
24 made with a full awareness of both the nature of the right being abandoned and the consequences  
25 of the decision to abandon it." Id. In making this determination, courts consider the totality of  
26 the circumstances surrounding the interrogation. Id. The government has the burden of proving  
27 by a preponderance of the evidence that the accused's waiver meets the above criteria. Colorado  
28

1 v. Connelly, 479 U.S. 157, 168 (1986). A person can waive their rights expressly with a written  
 2 or oral statement, or implicitly based on their actions or words. North Carolina v. Butler, 441  
 3 U.S. 369, 373 (1979). “An ‘implicit waiver’ of the ‘right to remain silent’ is sufficient to admit a  
 4 suspect’s statement into evidence.” Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (“Where  
 5 the prosecution shows that a Miranda warning was given and that it was understood by the  
 6 accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain  
 7 silent.”); see also United States v. Rodriguez, 518 F.3d 1072, 1080 (9th Cir. 2008); United States  
 8 v. Cazares, 121 F.3d 1241, 1244 (9th Cir. 1997).

9 Here, the state court could have reasonably concluded that petitioner validly waived his  
 10 Miranda rights. There is no evidence that the officer intimidated, coerced, or misled petitioner  
 11 during their conversation. Additionally, based on the evidence, petitioner was aware of the nature  
 12 and consequences of waiving his rights. At the scene of the accident, an officer interviewed  
 13 petitioner. (ECF No. 27-2 at 108-123.) After asking petitioner for his name, age, and birthdate,  
 14 the officer read petitioner his Miranda rights. After each statement, petitioner acknowledged that  
 15 he understood his rights. (Id. at 112-13.) The officer then asked “[h]aving those rights in mind,  
 16 are you willing to talk to me?” and petitioner answered “Yeah.” (Id. at 113.) Before asking any  
 17 questions, the officer clarified

18 All right. Well, the reason I gave – I read your Miranda is because you  
 19 obviously you don’t have the ability to walk away right now; okay. So  
 20 technically you’re not free to leave. So because of that and I’m going to  
 21 ask you some questions, I wanted to make sure you’re aware of your  
 rights –

22 (Id. at 113.) Petitioner again responded in the affirmative. (Id.) Petitioner told the officer that he  
 23 was driving his truck around a corner at about 45 miles an hour and crashed with a vehicle that  
 24 was driving in his lane. (Id.) Although he thought he was driving away from Placerville when  
 25 the accident occurred, he was actually driving towards Placerville. (Id. at 114.) Petitioner  
 26 admitted to having one beer about 2 to 3 hours before the accident and denied being on any  
 27 medication. (Id. at 115-16.) The officer administered a field sobriety test and, based on the  
 28

1 results of the test and the death of the other driver, arrested petitioner for manslaughter. (Id. at  
2 117-22.) In the ambulance, petitioner also admitted to drinking more than one beer. (ECF No.  
3 27-3 at 165.)

4 Petitioner argues that he could not validly waive his Miranda rights because he was  
5 intoxicated and suffered a head injury when he was interviewed. This Court disagrees. The  
6 Supreme Court has never held that impairments from drugs or alcohol negatively impact a  
7 Miranda waiver. See Matylinsky v. Budge, 577 F.3d 1083, 1095 (9th Cir. 2009); Adair v. Cates,  
8 No. EDCV 09-1406-RSWL (JEM), 2012 WL 4846263, at \*30 (C.D. Cal. Aug. 23, 2012),  
9 adopting report and recommendation, 2012 WL 4513590 (C.D. Cal. Oct. 1, 2012). Furthermore,  
10 courts have found that evidence that the accused was alert and able to communicate is sufficient  
11 to demonstrate the required level of comprehension to waive Miranda rights. See, e.g., United  
12 States v. Comstock, 443 F. App'x 310, 312 (9th Cir. 2011); Shackleford v. Hubbard, 234 F.3d  
13 1072, 1080 (9th Cir. 2000); Castro v. Baker, No. 2:16-cv-01237-MMD-EJY, 2020 WL 592321, at  
14 \*20 (D. Nev. Feb. 6, 2020); United States v. Richards, No. CR 06-129-N-EJL, 2006 WL  
15 3743807, at \*2 (D. Idaho Dec. 18, 2006) (finding that waiver was valid despite the accused's  
16 intoxication based on officers' testimony that the accused appeared to be "aware, responsive, and  
17 coherent to their questions and voluntarily gave her consent" to be questioned). Here, based on  
18 the trial record outlined above, the state court reasonably concluded that petitioner was  
19 sufficiently alert and able to communicate to validly waive his rights, despite his intoxicated state  
20 and his head injury. (ECF No. 27-2 at 108-123.)

21 Even if there was a Miranda error, the erroneous admission of defendant's testimony in  
22 violation of the Fifth Amendment is subject to the harmless error analysis. Neder v. United  
23 States, 527 U.S. 1, 18 (1999); Ghent v. Woodford, 279 F.3d 1121, 1126 (9th Cir. 2002). In  
24 reviewing the prejudicial effect of the erroneous admission of testimony, the question is whether  
25 the erroneously admitted evidence had a "substantial and injurious effect or influence in  
26 determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); see also Bains  
27 v. Cambra, 204 F.3d 964, 977 (9th Cir. 2000). In this case, petitioner's statements to the officer  
28 were minimal in comparison to the other evidence of his guilt, including the blood test revealing

petitioner's blood content was 0.12 percent and contained THC and alprazolam, victim's husband heard the accident, Chevy truck was embedded in the front cabin of the victim's Subaru, and forensic analysis identified petitioner as speeding and driving on the wrong side of the road before the collision.

This Court concludes that the state court's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court authority and recommends denying relief on this claim.

C. Fourth Amendment Search and Seizure Claim (Claim Three)

Petitioner claims that he did not consent to a blood alcohol test but was forced to undergo this test in violation of his Fourth Amendment rights. (ECF No. 1 at 22.) In response, respondent argues petitioner's Fourth Amendment claim is barred on federal habeas review because petitioner had a full and fair opportunity to raise the claim in state court. (ECF No. 24 at 37.) The California Supreme Court summarily rejected petitioner's claim.

The Supreme Court has held that when a state court has provided petitioner with a full and fair opportunity to litigate a Fourth Amendment claim, federal habeas relief is not available on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial. Stone v. Powell, 428 U.S. 465, 494-95 (1976). The Ninth Circuit has determined that the Supreme Court's holding in Stone v. Powell survived the passage of the Antiterrorism Effective Death Penalty Act. Newman v. Wengler, 790 F.3d 876, 880 (9th Cir. 2015) (per curiam). On habeas review, "[t]he relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996); see also Moormann v. Schriro, 426 F.3d 1044, 1053 (9th Cir. 2005) (finding that petitioner had a full and fair opportunity to litigate his Fourth Amendment claim because he raised the claim in a pre-trial motion, the trial court held a hearing and denied his motion, and an appellate court reviewed the trial court's decision).

Here, petitioner had a full and fair opportunity to litigate his Fourth Amendment claim. Under California law, a defendant can move to suppress evidence on the grounds that it was



1 obtained in violation of the Fourth Amendment. See Lugo v. Borg, 81 F.3d 169 (9th Cir. 1996);  
2 Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990). Although petitioner did not move to  
3 suppress the results of his blood alcohol test, he could have and fails to identify any deficiencies  
4 in California's procedure that denied him a full and fair opportunity to litigate his claim. The  
5 Ninth Circuit has rejected habeas claims regarding non-consensual blood test following an arrest  
6 when petitioner had a full and fair opportunity to litigate the claim in state court. See, e.g., Fain  
7 v. Borg, 52 F.3d 332 (9th Cir. 1995). This Court concludes that habeas relief is not warranted on  
8 petitioner's Fourth Amendment claim.

9 D. Government Duty to Preserve Evidence (Claim Four)

10 Petitioner claims that the government violated its duty to preserve evidence by failing to  
11 provide defense counsel with three pieces of evidence: (1) petitioner's blood sample; (2) a broken  
12 weld on the axle from petitioner's vehicle; and (3) the black box from the victim's Subaru. (ECF  
13 No. 1 at 22-24.)

14 In response, respondent argues that petitioner cannot prove the merits of the claim; he has  
15 not established that the government failed to preserve apparent exculpatory evidence or that the  
16 government's actions constitute bad faith. Even if an error occurred, respondent contends that  
17 petitioner did not suffer any prejudice because his guilt for the charged offenses was proved by  
18 other evidence. (ECF No. 24 at 40-41.) The California Supreme Court summarily rejected  
19 petitioner's claim.

20 "The Due Process Clause of the Fourteenth Amendment requires the State to disclose to  
21 criminal defendants favorable evidence that is material either to guilt or to punishment."  
22 California v. Trombetta, 467 U.S. 479, 481 (1984). Any constitutional duty of the States to  
23 preserve evidence is "limited to evidence that might be expected to play a significant role in the  
24 suspect's defense." Id. at 488. To state a claim that the government failed to affirmatively  
25 preserve evidence, petitioner has to prove two elements; first, the evidence had "exculpatory  
26 value that was apparent before the evidence was destroyed, and be of such a nature that the  
27 defendant would be unable to obtain comparable evidence by other reasonably available means,"  
28

1 id. at 489, and second, the police acted in bad faith in failing to preserve the evidence. Arizona v.  
2 Youngblood, 488 U.S. 51, 58 (1988).

3 Petitioner claims that the government violated its duty to preserve evidence in three ways,  
4 which this Court discusses in turn below.

5 i. Blood Sample

6 Petitioner complains that, although DOJ toxicologist Nina Giorgi screen tested the blood  
7 sample for prescription drugs, her testing consumed the entire sample leaving none for defense  
8 counsel's independent analysis. (ECF No. 1 at 23; see also ECF No. 27-6 at 5-15.) He argues  
9 that the government deliberately collected an insufficient blood sample to prevent petitioner from  
10 conducting his own testing to impeach the state's witness. (ECF No. 1 at 24.) This claim fails for  
11 two reasons. First, petitioner offers no evidence to support his claim of bad faith. Second, even  
12 though the sample was not available to defense counsel, the Ninth Circuit has found that "[m]any  
13 other methods of challenging the results of a breathalyzer test are available to defendants, which  
14 makes the unavailability of breath or blood samples constitutionally acceptable." Gundersen v.  
15 Anchorage, No. 91-36165, 1992 WL 207994, at \*2 (9th Cir. Aug. 28, 1992) ("Although we  
16 recognize that in some cases it could prove valuable to a defendant to have an independent  
17 analysis of his blood or breath, *Trombetta* makes clear that the Constitution does not require the  
18 availability of those tests."); see also United States v. Torres-Casillas, No. 91-50544, 1992 WL  
19 129436, at \*1 (9th Cir. June 10, 1992). Here, petitioner had the opportunity to challenge the  
20 government's test results by cross-examining witnesses at trial. (ECF No. 27-4 at 205-17; ECF  
21 No. 27-5 at 225-29; ECF No. 27-6 at 14-15.) This Court concludes that petitioner has not shown  
22 that the government violated its duty to preserve evidence of the blood sample.

23 ii. Broken Weld on Axle from Petitioner's Vehicle

24 Second, petitioner claims that the district attorney's investigator examined the vehicles for  
25 mechanical problems and found a broken weld on the axle of petitioner's vehicle. Petitioner  
26 argues that his counsel was not given an equal opportunity to determine whether the damaged car  
27 part affected petitioner's ability to control his vehicle. (ECF No. 1 at 23-24.) This claim also  
28 cannot succeed. Petitioner had a comparable opportunity to assess the vehicle's mechanical

1 problems by cross-examining the accident reconstruction witnesses at the trial. (See ECF No. 27-  
2 4 at 133-35; ECF No. 27-5 at 44-53, 160-90.) Petitioner also does not provide any evidence that  
3 the government withheld the damaged car part in bad faith. As a result, this claim also does not  
4 warrant habeas relief.

5           iii.     Subaru's Black Box

6           Lastly, petitioner asserts that the Subaru's black box was withheld from him. (ECF No. 1  
7 at 23.) He states that this "single piece of evidence would have dramatically affected the  
8 [outcome] of this case by conclusively establishing that Mr. Caldwell's testimony that he was  
9 traveling between 10 to 15 MPH was false and misleading." (Id. at 24.) Like the others, this  
10 claim falls flat. Neither party had access to the Subaru's black box; a witness testified that  
11 "Subaru has elected not to give that proprietary information out. So we could not access the black  
12 box on the Subaru." (ECF No. 27-5 at 105; see also id. at 171 (confirming that the officers were  
13 unable to gather any information from the Subaru's black box.)) Petitioner, therefore, cannot  
14 establish that the government acted out of bad faith by not turning over the black box.

15           This Court concludes that the state court's rejection of petitioner's failure to preserve  
16 evidence claim was not contrary to, or an unreasonable application of, clearly established  
17 Supreme Court authority and recommends denying habeas relief on this claim.

18           E. Claim that Statutes are Void for Vagueness (Claim Five)

19           Petitioner claims that the statutes used to convict him under an implied malice theory and  
20 gross vehicular manslaughter while intoxicated are vague and violate due process. (ECF No. 1 at  
21 25-27.) In particular, he argues that while the average person knows driving under the influence  
22 may result in the loss of their license, they do not know that if they drive under the influence and  
23 get into an accident, killing a person, they could be convicted of murder. (Id. at 26-27.) In  
24 response, respondent argues that the state court's decision rejecting this claim was reasonable.  
25 (ECF No. 24 at 41.)

26           The Fifth Amendment states that "[n]o person shall ... be deprived of life, liberty, or  
27 property, without due process of law." The Supreme Court has found that the government  
28

1 violates this principle by “taking away someone’s life, liberty, or property under a criminal law so  
2 vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless  
3 that it invites arbitrary enforcement.” Johnson v. United States, 576 U.S. 591, 595 (2015) (citing  
4 Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)); see also Sessions v. Dimaya, 138 S. Ct. 1204,  
5 1212 (2018). To determine whether a statute gives fair warning, “the touchstone is whether the  
6 statute, either standing alone or as construed, made it reasonably clear at the relevant time that the  
7 defendant’s conduct was criminal.” United States v. Lanier, 520 U.S. 259, 267 (1997); see also  
8 United States v. Kim, 449 F.3d 933, 942 (9th Cir. 2006) (“Thus, if a statute is not sufficiently  
9 clear to provide guidance to citizens concerning how they can avoid violating it and to provide  
10 authorities with principles governing enforcement, a defendant cannot be punished for violating  
11 that statute.”)

12 Here, petitioner was convicted of second degree murder under California Penal Code  
13 section 187(a) and gross vehicular manslaughter while intoxicated under California Penal Code  
14 section 191.5(a). (ECF No. 27-2 at 80-81.) Under California law, murder is defined as “the  
15 unlawful killing of a human being, or a fetus, with malice aforethought.” Cal. Penal Code  
16 § 187(a). California law divides murder into first and second degree murder. People v. Chun, 45  
17 Cal. 4th 1172, 1181 (2009). First degree murder is a willful, deliberate, and premeditated killing,  
18 a killing committed during the commission of an enumerated list of felonies, or a killing that  
19 involved an enumerated circumstance. Cal. Penal Code § 189. “All other kinds of murders are of  
20 the second degree.” Cal. Penal Code § 189. The required malice may be express or implied.  
21 Cal. Penal Code § 188(a). “Malice is express when there is manifested a deliberate intention to  
22 unlawfully take away the life of a fellow creature.” Id. at § 188(a)(1). On the other hand,  
23 “[m]alice is implied when no considerable provocation appears, or when the circumstances  
24 attending the killing show an abandoned or malignant heart.” Id. at § 188(a)(2). California courts  
25 have interpreted implied malice as having a physical and mental component. Chun, 45 Cal. 4th at  
26 1181. The physical component is met when a defendant does “an act, the natural consequences of  
27 which are dangerous to human life.” People v. Watson, 30 Cal. 3d 290, 300 (1981) (internal  
28 quotation and citation omitted). The mental component is met if defendant “knows that his

conduct endangers the life of another and ... acts with a conscious disregard for life.” Id.

California law defines gross vehicular manslaughter while intoxicated as

the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.

Cal. Penal Code § 191.5(a). Gross negligence is an objective test; “whether a reasonable person in defendant’s position would have been aware of the risks involved.” People v. Ochoa, 6 Cal. 4th 1199, 1204 (1993) (citation omitted).

This Court concludes that a state court could reasonably reject petitioner’s argument that the relevant statutes are unconstitutionally vague. There is no clearly established Supreme Court precedent finding that California’s implied malice or gross negligence standards are unconstitutionally vague. To the contrary, courts that have reached this issue in the Ninth Circuit have determined that California’s second degree murder and gross vehicular manslaughter statutes are not unconstitutionally vague. See, e.g., Masoner v. Thurman, 996 F.2d 1003, 1007-08 (9th Cir. 1993); Callion v. Paramo, No. CV 16-4927-SJO (SP), 2013 WL 4676498, at \*4 (C.D. Cal. May 29, 2018), adopting report and recommendation, 2018 WL 4676911 (C.D. Cal. Sept. 25, 2018); Lopez v. Gastelo, No. 16-CV-00735-LAB (WVG), 2016 WL 8453921, at \*4 (S.D. Cal. Dec. 5, 2016) (“The Johnson decision has absolutely no applicability to the California murder statute under which Petitioner was convicted and his reliance on Johnson is therefore misplaced.”), adopting report and recommendation, 2017 WL 902137 (S.D. Cal. Mar. 6, 2017); Howard v. Campbell, No. CIV S-04-2414 FCD KJM P, 2007 WL 2601418, at \*6 (E.D. Cal. Sept. 6, 2007), adopting report and recommendation, 2007 WL 2853860 (E.D. Cal. Sept. 27, 2007).

For these reasons, this Court recommends denying habeas relief on this claim.

#### F. Ineffective Assistance of Counsel (Claim Six)

Petitioner claims that defense counsel was ineffective for failing to investigate the following facts: (1) discrepancy between Mr. Caldwell’s phone and Mr. Caldwell’s claim that he

ended the phone call before the accident; (2) level of hydrocodone in victim's body at time of the accident; (3) potential jurors' exposure to news reports about the accident; (4) collection of petitioner's blood sample without consent; (5) mechanical problems with both vehicles or call an expert to rebut the prosecution's accident reconstruction witness; (6) discrepancies in alcohol testing device and logs; (7) investigate how the paint marks on the accident pictures seemed to change colors; (8) failure to suppress reference to petitioner's medicinal marijuana card and prior marijuana conviction; (9) evidence that petitioner had mental illness; (10) failure to impeach intoxicated witness Joey Padilla; (11) failure to make or argue pretrial motions including change of venue, gag order, Pitchess motion, 995 motion, 1181 motion for new trial or mistrial, and improper exclusion of Mrs. Caldwell's toxicology report; (12) failure to call lay and expert witnesses to show that petitioner did not usually drive under the influence, and was, because of preexisting conditions, careful to monitor his condition; (13) defense counsel coerced petitioner into testifying against his will and restricted him to yes or no answers; and (14) failure to exclude a juror whose brother was killed in a DUI accident. (ECF No. 1 at 27-32; see also ECF No. 30.) In response, respondent argues that the state court reasonably rejected petitioner's claims of ineffective assistance of counsel. (ECF No. 24 at 46-68.) The California Supreme Court summarily rejected all of these 14 subclaims in petitioner's state habeas petition.

To state an ineffective assistance of counsel claim, a defendant must show that (1) his counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) his counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). For the deficiency prong, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (citation omitted). For the prejudice prong, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

"The standards created by Strickland and § 2254(d) are both 'highly deferential,' and

1 when the two apply in tandem, review is ‘doubly’ so.” Richter, 562 U.S. at 105 (internal citations  
2 omitted); see also Landrigan, 550 U.S. at 473. When § 2254(d) applies, the “question is whether  
3 there is any reasonable argument that counsel satisfied Strickland’s deferential standard.”  
4 Richter, 562 U.S. at 105.

5 1. The Phone Call

6 Petitioner alleges that his counsel was deficient because he failed to investigate the  
7 discrepancy between Mr. Caldwell’s testimony that he hung up the phone when they exited the  
8 freeway, and the evidence that the phone was being used when it was recovered after the  
9 accident. (ECF No. 1 at 28.) Further, petitioner also contends that the car had a built-in hands  
10 free device. (Id.) He claims that both could have been mitigating evidence. (Id.)

11 This Court concludes that that state court could have reasonably concluded that counsel’s  
12 performance was not deficient or prejudicial. Although “counsel has a duty to make reasonable  
13 investigations or to make a reasonable decision that makes particular investigations unnecessary,”  
14 Strickland, 466 U.S. at 691, that duty is not limitless. It is counsel’s responsibility to “formulate a  
15 strategy that was reasonable at the time and to balance limited resources in accord with effective  
16 trial tactics and strategies.” Richter, 562 U.S. at 107. A “decision not to investigate must be  
17 directly assessed for reasonableness in all the circumstances, applying a heavy measure of  
18 deference to counsel’s judgments.” Strickland, 466 U.S. at 691. “An attorney need not pursue an  
19 investigation that would be fruitless, much less one that might be harmful to the defense.”  
20 Richter, 562 U.S. at 108. When defense counsel excludes some issues in favor of others, courts  
21 apply a strong presumption that counsel took those actions “for tactical reasons rather than  
22 through sheer neglect.” Yarborough v. Gentry, 540 U.S. 1, 8 (2003). Even if defense counsel  
23 inadvertently excluded evidence, relief is not automatically warranted. Id. at 8-9 (“The issues  
24 counsel omitted were not so clearly more persuasive than those he discussed that their omission  
25 can only be attributed to a professional error of constitutional magnitude.”); see also Cheney v.  
26 Washington, 614 F.3d 987, 996 (9th Cir. 2010). The inconsistency in evidence regarding when  
27 Mr. Caldwell hung up his phone is irrelevant to whether petitioner committed second degree  
28 murder or gross vehicular manslaughter while intoxicated. Nor would this evidence have resulted



1 in a more favorable outcome for petitioner given the overwhelming evidence of his guilt.

2 Because the state court could have reasonably concluded that defense counsel's investigatory  
3 omissions on this issue were not deficient or prejudicial, habeas relief is not warranted on this  
4 claim.

5 2. Mrs. Caldwell's Toxicology Report

6 Next, petitioner claims that his counsel failed to argue that Mrs. Caldwell's toxicology  
7 report should have been admitted in evidence to support his contributory negligence defense.  
8 (ECF No. 1 at 28.)

9 Petitioner's argument contradicts the record. Defense counsel made two requests to  
10 introduce this evidence. Defense counsel notified the state that he intended to "ask the husband  
11 of the victim questions about the victim's blood results because those results showed the presence  
12 of prescription drugs." (ECF No. 27-1 at 66.) In response, the state filed a motion in limine to  
13 exclude the evidence on the grounds that contributory negligence is not a defense to a criminal  
14 charge and the evidence is legally irrelevant. (*Id.* at 66-72.) The trial court heard oral argument  
15 and tentatively ruled to exclude the evidence. (ECF No. 27-3 at 36-38.) During the trial, Mr.  
16 Caldwell testified that he was driving behind his wife and did not notice anything unusual about  
17 her driving, and defense counsel cross-examined him. (*Id.* at 69-75.) Later in the trial, defense  
18 counsel renewed his objection to admit the toxicology report from Mrs. Caldwell to show  
19 comparative negligence, and the trial court denied the request. (ECF No. 27-5 at 191-92.) To the  
20 extent petitioner is contending that his counsel was ineffective for failing to admit this evidence  
21 for a third time, this claim fails. The trial court had already rejected petitioner's attempts to  
22 introduce to prove contributory negligence, and petitioner not demonstrated why it would succeed  
23 on a third try. Defense counsel cannot be ineffective for not raising a meritless argument. *See*  
24 *Martinez v. Ryan*, 926 F.3d 1215, 1226 (9th Cir. 2019); *James v. Borg*, 24 F.3d 20, 27 (9th Cir.  
25 1994). Because it was not objectively unreasonable for the state court to reject petitioner's  
26 argument, this Court recommends denying habeas relief on this claim as well.

27 3. Media Coverage and Potential Jurors

28 Petitioner claims his defense counsel should have investigated potential juror bias based

1 on media coverage because he appeared in ten front-page news articles and “a [widespread]  
2 Facebook campaign was launched against him.” (ECF No. 1 at 28.) He wanted counsel to  
3 investigate potential bias by asking questions during voir dire, preparing a gag order, and taking  
4 reasonable steps to ensure a fair trial. (*Id.*) He claims that his counsel did none of these things,  
5 denying him a fair and impartial jury trial. (*Id.*)

6 It is axiomatic that the Sixth Amendment guarantees criminal defendants the right to trial  
7 by an impartial jury. *Skilling v. United States*, 561 U.S. 358, 377 (2010). A juror’s exposure to  
8 news accounts of the crime alone, however, does not amount to a presumption that defendant was  
9 denied due process. *Id.* at 380. “Prominence does not necessarily produce prejudice, and juror  
10 *impartiality*, we have reiterated, does not require *ignorance*.” *Id.* at 381; *see also Irvin v. Dowd*,  
11 366 U.S. 717, 723 (1961) (“To hold that the mere existence of any preconceived notion as to the  
12 guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a  
13 prospective juror’s impartiality would be to establish an impossible standard. It is sufficient if a  
14 juror can lay aside his impression or opinion and render a verdict based on the evidence presented  
15 in court.”). Here, petitioner has not shown that the jurors were aware of the media coverage or  
16 that they had preconceived notions of guilt or innocence of the accused. At best, petitioner cites  
17 to four newspaper articles from the Mountain Democrat dated between December 19, 2012, and  
18 April 12, 2013, attached to a state habeas petition. (ECF No. 27-37 at 24-29.) But these news  
19 articles predate the trial by almost a year and merely report the facts surrounding his trial  
20 proceedings. Because petitioner failed to provide any evidence or actual or presumed juror bias  
21 based on media coverage of the case, this Court concludes that it was not objectively reasonable  
22 for the state court to deny this claim and recommends denying habeas relief.

#### 23 4. Additional Testing of Petitioner’s Blood Sample

24 Petitioner argues that his counsel was ineffective for failing to challenge the collection of  
25 his blood sample without his consent and to perform additional tests on the sample. (ECF No. 1  
26 at 28-29.)

27 To succeed on an ineffective assistance of counsel claim based on a failure to raise motion  
28 to suppress, petitioner must prove that his motion would have meritorious and a reasonable

1 probability that the jury would have reached a different verdict without the challenged evidence.  
2 Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); see also Ortiz-Sandoval v. Clarke, 323 F.3d  
3 1165, 1170 (9th Cir. 2003). A meritorious Fourth Amendment claim is not enough; habeas  
4 petitioners must also prove that their counsel's performance was deficient and prejudicial.  
5 Kimmelman, 477 U.S. at 382. "As is obvious, Strickland's standard, although by no means  
6 insurmountable, is highly demanding." Id. Here, petitioner cannot prove either factor. Counsel's  
7 performance was not deficient because there is evidence that petitioner consented to the blood  
8 sample. (ECF No. 27-3 at 166, 170.) Even assuming that counsel's performance was deficient,  
9 petitioner cannot demonstrate a reasonable probability that the jury would have reached a  
10 different verdict if the blood sample evidence had been excluded. There was other evidence that  
11 petitioner was intoxicated at the time the accident occurred. For example, he admitted to drinking  
12 one or two beers during the night, his eyes were "bloodshot and watery eyes," his speech was  
13 slurred, and his horizontal gaze nystagmus and preliminary alcohol screening test results  
14 indicated that he had consumed alcohol. (ECF No. 27-3 at 148, 159-65.) Counsel cannot be  
15 deemed ineffective for failing to raise a futile motion. Martinez, 926 F.3d at 1226; Borg, 24 F.3d  
16 at 27.

17 Petitioner's second argument is that his counsel was ineffective for failing to retest his  
18 blood sample. As mentioned earlier, the state's testing consumed the entire sample leaving none  
19 for defense counsel's independent analysis. (ECF No. 1 at 23; see also ECF No. 27-6 at 5-15.)  
20 Counsel has a duty to make reasonable investigations. Strickland, 466 U.S. at 691. But it is not  
21 counsel's fault when the state's testing consumes the entire sample. The record suggests that, had  
22 the sample been available, defense counsel would have attempted to retest it. (ECF No. 27-3 at  
23 30 ("Unfortunately, the sample was consumed and I was unable to test it — or retest it."))  
24 Instead, as this Court noted above, even though defense counsel was unable to run tests on the  
25 sample, defense counsel had an opportunity to challenge the state's test results by cross-  
26 examining witnesses at trial. (ECF No. 27-4 at 205-17; ECF No. 27-5 at 225-29; ECF No. 27-6 at  
27 14-15.) This Court concludes that the state court could have reasonably rejected petitioner's  
28 ineffective assistance of counsel claim on this issue and recommends denying relief.

## 1 5. Failure to Investigate Mechanical Problems with Vehicles

2 Petitioner asserts that his defense counsel refused to investigate issues related to both  
3 vehicles, namely: (1) whether the vehicles had mechanical problems; (2) Subaru's recalls  
4 regarding unintended acceleration, airbag deployment, and brakes; (3) failure to offer an accident  
5 reconstruction expert or proposed witnesses for the defense; and (4) failure to present issues with  
6 the state's reconstruction expert's report. (ECF No. 1 at 29; see also id. at 31.) After  
7 independently reviewing the record, this Court concludes that it was not objectively unreasonable  
8 for the state court to reject petitioner's ineffective assistance of counsel claim.

9 First, there is no evidence that the vehicles had mechanical problems. Craig Zaragoza, a  
10 CHP officer trained in conducting mechanical vehicle inspections, testified that he inspected  
11 petitioner's 1999 Chevy Silverado, including the tires, modified suspension, brake and reservoir  
12 lines, steering, acceleration, and concluded that the vehicle did not have mechanical problems that  
13 caused the collision. (ECF No. 27-4 at 124-132.) He also noted that although there was a ladder  
14 bar installed on the rear axle with a ratchet strap wrapped around the axle tube and ladder bar, it  
15 did not cause a mechanical problem. (Id. at 132-33.) Defense counsel cross-examined Zaragoza  
16 about the raised suspension, and Zaragoza testified that it "affects the roll center, which would  
17 mean that you would have to take sharp turns at a slower speed." (Id. at 133-34.) Defense  
18 counsel also questioned Zaragoza about his inspection of the victim's Subaru, and Zaragoza  
19 testified that he found no abnormalities. (Id. at 135.) Petitioner presents no evidence to support  
20 his theory that either vehicle had mechanical problems. His vague, unsupported claim that  
21 defense counsel could have done more does not warrant habeas relief. See Greenway v. Ryan,  
22 856 F.3d 676, 680 (9th Cir. 2017); Borg, 24 F.3d at 26 ("Conclusory allegations which are not  
23 supported by a statement of specific fact do not warrant habeas relief.")

24 Second, petitioner fails to cite to sufficient evidence that the victim's Subaru was subject  
25 to manufacturer's recall notices. To support his claim, petitioner cites to what appears to be an  
26 excerpt from an expert report listing NHTSA documented complaints, investigations, recalls, and  
27 technical services bulletins for 2012 Subaru Legacy as of January 30, 2013. (ECF No. 27-37 at  
28 6.) But he provides no evidence that the victim's vehicle was subject to a recall that would have

1 caused the collision. The cited report excerpt provides evidence to the contrary; it states that  
2 “[n]one of the conditions specified by the search are alleged or believed to have been a causative  
3 or contributory factor in the occurrence of the collision.” (*Id.*) Based on this evidence, defense  
4 counsel’s performance was neither deficient nor prejudicial for not investigating this issue.

5 Lastly, petitioner faults his counsel for not engaging a reconstruction expert, calling other  
6 witnesses, or presenting issues with the state’s expert report. (ECF No. 1 at 29.) But it is an  
7 attorney’s decision whether to offer a witness at trial. *See Lord v. Wood*, 184 F.3d 1083, 1095  
8 (9th Cir. 1999) (“A witness’s testimony consists not only of the words he speaks or the story he  
9 tells, but also of his demeanor and reputation.”). Furthermore, this argument is also not supported  
10 by the record. Petitioner provides no evidence that an expert or the proposed witnesses would  
11 have provided helpful testimony for his defense regarding how the accident occurred or to rebut  
12 the state’s expert’s testimony or report. Without such evidence, petitioner has failed to prove the  
13 defense counsel was ineffective. *See Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000). Based  
14 on this Court’s review of the record, instead of offering defense witnesses on accident  
15 reconstruction, defense counsel made a tactical decision to cross-examine the state’s accident  
16 reconstruction witnesses. (ECF No. 27-5 at 44-56 (cross-examination of Christopher Port); *id.* at  
17 99-100, 160-90 (cross-examination of Robert Snook)). This Court concludes that the state court’s  
18 rejection of petitioner’s claim was not objectively unreasonable and recommends denying habeas  
19 relief.

#### 20 6. Failure to Investigate Discrepancy with PAS Device

21 Petitioner argues that his defense counsel failed to investigate the discrepancy between the  
22 serial number for the (a) PAS device used with (b) the device listed in the officer’s police report.  
23 (ECF No. 1 at 29.) This argument is unsupported by the trial record, which demonstrates that  
24 defense counsel thoroughly explored this issue in cross-examination. Shawn Callaway, PAS  
25 Coordinator for the Placerville area office, testified that he checked the accuracy of the PAS  
26 device just before and after the accident. (ECF No. 27-4 at 77-80.) Defense counsel cross-  
27 examined Callaway about discrepancy in the PAS device serial number listed in Officer Hoey’s  
28 report, and Callaway testified “[w]e did notice that the [PAS device] that was in [Officer Hoey’s]

1 report was different from the serial number that we did have at the office.” (Id. at 83 (testifying  
2 that the device listed in the report “did not exist”); id. at 84 (stating that the serial number was off  
3 by one number)). Despite this error, Callaway was certain that the accuracy log he testified to  
4 was connected with the relevant accident. (Id. at 84.) Ian Hoey, the officer who conducted the  
5 PAS device test at the accident scene, testified that he misprinted the serial number from his  
6 notes. (ECF No. 27-3 at 152.) When he administered the test, the device was working properly.  
7 (Id. at 154-55 (But they make this machine foolproof. If the machine isn’t working properly, it  
8 will not operate.”)) The PAS device maintains an internal record of the results, which can be  
9 printed out. (ECF No. 27-4 at 5.) Officer Hoey also testified that printed test results are  
10 “consistent and accurate” with the times, dates, and results from petitioner’s PAS tests. (Id. at 6.)  
11 Based on the record, this Court finds no evidence to supported petitioner’s claim that defense  
12 counsel’s performance was deficient or prejudicial for not further addressing the PAS serial  
13 number discrepancy. Because such efforts would have been cumulative and futile, the state  
14 court’s denial of petitioner’s claim was not objectively unreasonable, and relief is unwarranted.

#### 15 7. Failure to Investigate Paint Marks

16 Next, petitioner claims that his counsel was deficient for failing to independently  
17 investigate why the paint marks on the accident photos appear to change color. (ECF No. at 30.)  
18 Petitioner states that defense counsel instead asked the district attorney, who “offered an  
19 explanation harmful to the defense.” (Id.) “Petitioner later learned, but could not get the  
20 evidence developed to prove, that three or four other accidents occurred at this same location in  
21 that same year.” (Id.)

22 This claim fails. As petitioner admits, he has no evidence to support his theory that the  
23 accident photos included evidence from other collisions. To the contrary, the trial evidence  
24 contains a reasonable inference that all the different paint marks pertain to the relevant accident  
25 scene. Witnesses testified that they use orange spray paint at collision investigation scenes,  
26 including this accident scene. (ECF No. 27-4 at 6-7; ECF No. 27-5 at 99, 117-18.) When the  
27 state’s reconstruction expert Robert Snook went back to the scene to conduct his analysis, “the  
28 orange spray paint marks that Officer Nett had put on the pavement were still there.” (ECF No.

27-5 at 118.) To verify that Snook collected all the marks, he used a different paint spray over the orange spray marks.

[T]he standard procedure is we used a different color over the top. So when we would take a measurement to one of Officer Nett's orange spray paint marks, we put green or blue on top of that orange. Now, the orange mark wouldn't show orange anymore. It would show as blue. And this allowed us to make sure that we had collected all the physical evidence that the officer had talked about.

(Id.) Exhibit 64, which plaintiff cites, actually disproves his theory and confirms Snook's testimony. (Id. at 118-19 ("In People's 64, this is a photograph taken of the collision scene itself. It was taken after the fact. This was during our analysis when we went back out in May.")) This Court concludes that the state court's rejection of the claim was reasonable and recommends denying habeas relief.

#### 8. Failure to Suppress References to Medical Marijuana Card and Prior Conviction

Petitioner argues that his counsel should have moved to suppress references to his medicinal marijuana card and his prior conviction for sales of marijuana, and that this evidence is inadmissible. (ECF No. 1 at 30.)

This Court concludes that the state court's rejection of his claim was not objectively unreasonable. Contrary to petitioner's argument, defense counsel moved to exclude this evidence in a motion in limine. (ECF No. 27-1 at 78-81.) The state wanted to use this evidence to show his "personal knowledge of the effect of marijuana on his person and that is directly relevant to his knowledge of how he would be affected if he drove with marijuana in [] his system." (Id. at 99-100.) Specifically, the state intended to introduce an August 13, 2012 tape recorded statement by petitioner explaining to an El Dorado County Deputy Sheriff how much marijuana he uses daily, the amount of time it takes to feel the effect, and how marijuana makes him feel tired. (Id. at 100.) Based on those admissions, petitioner plead guilty to one felony count of Health Safety Code section 11359, Possession of Marijuana for Sale. (Id.) To use that evidence in this case, the trial court found that an EC 402 hearing may be needed and later found the evidence admissible. (Id. at 264; ECF No. 27-3 at 29-32.) At trial, an officer testified that petitioner admitted to



1 smoking marijuana around 6:00 p.m. before the accident. (*Id.* at 164, 177-78.) Because it was  
2 clear that petitioner was impaired by alcohol, “[t]he fact that he may have also been under the  
3 influence of drugs wasn’t my prime concern.” (ECF No. 27-4 at 62.)

4 Even after the evidence was deemed admissible, defense counsel attempted to mitigate the  
5 impact of this evidence by requesting a limiting instruction before Detective Palmberg’s  
6 testimony. Based on defense counsel’s request, the trial court instructed the jury that

7           You’re going to be hearing some testimony in just a moment, and this  
8           testimony is being offered to you for a very limited purpose. You are only  
9           going to use this testimony for the purpose of determining the issue of  
10          [petitioner’s] knowledge of the effects of marijuana on himself and the  
11          use of marijuana on this particular date.

12 (ECF No. 27-4 at 151-52.) Detective Palmberg, an El Dorado County Deputy Sheriff, testified  
13 about his August 2012 conversation with petitioner regarding petitioner’s use of marijuana and its  
14 effects on him. (*Id.* at 153-61.) Defense counsel cross-examined Detective Palmberg on these  
15 issues. (*Id.* at 162-67.) Petitioner’s mere suggestion that defense counsel could have done more  
16 is insufficient to demonstrate that defense counsel’s performance was deficient or prejudicial. As  
17 a result, this Court concludes that the state court’s rejection of this claim was reasonable and  
18 recommends denying relief.

#### 19           9. Failure to Present Evidence of Mental Illness

20           Next, petitioner claims that defense counsel ignored evidence that he suffered from  
21 schizophrenia and asked for the psychiatrist in jail. (ECF No. 1 at 30.) Petitioner asserts that  
22 counsel only moved to change his plea after his brother brought evidence of his mental illness at  
23 sentencing. (*Id.*)

24           A criminal defendant has a constitutional right not to be convicted while he is incompetent  
25 to stand trial. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate v. Robinson*, 383 U.S. 375,  
26 378, 385 (1966) (concluding that based on the evidence of mental illness introduced at trial,  
27 defendant was entitled to a hearing on his competency to stand trial). To undergo a criminal trial,  
28 an accused person must have “the capacity to understand that nature and object of the proceedings

1 against him, to consult with counsel, and to assist in preparing his defense....” Drope v.  
 2 Missouri, 420 U.S. 162, 171 (1975). “[E]vidence of a defendant’s irrational behavior, his  
 3 demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in  
 4 determining whether further inquiry is required, but that even one of these factors standing alone  
 5 may, in some circumstances, be sufficient.” Id. at 180. “Counsel’s failure to move for a  
 6 competency hearing violates the defendant’s right to effective assistance of counsel when ‘there  
 7 are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the  
 8 defendant’s competency, and there is a reasonable probability that the defendant would have been  
 9 found incompetent to stand trial had the issue been raised and fully considered.’” Stanley v.  
 10 Cullen, 633 F.3d 852, 862 (9th Cir. 2011) (citing Jermyn v. Horn, 266 F.3d 257, 283 (3d Cir.  
 11 2001)).

12 Based on an independent review of the record, this Court finds that there is insufficient  
 13 evidence of petitioner’s incompetence during the guilt phase to justify a conclusion that defense  
 14 counsel was ineffective in failing to move for competency hearing or to further investigate  
 15 petitioner’s mental health. Defense counsel learned of the issue the morning before sentencing  
 16 and brought it to the court’s attention. See Simon v. Gastelo, 697 F. App’x 903, 905 (9th Cir.  
 17 2017)). Defense counsel informed the court that petitioner’s brother told him that petitioner was  
 18 housed at a psychiatric health facility and was treated for schizophrenia a few weeks before the  
 19 accident. (ECF No. 27-6 at 223.) Defense counsel subsequently asked petitioner about his  
 20 mental health, and petitioner told him that he heard voices and was medicated. (Id.) He did not  
 21 disclose this information because “[n]obody asked.” (Id.) Defense counsel did not ask petitioner  
 22 about his history of mental illness before because “I didn’t think he did.” (Id.) In opposition to  
 23 the defense counsel’s motion for a continuance, the state argued “[h]e’s been completely lucid  
 24 during the trial, so I don’t think there’s any issue that would have impacted our trial. Counsel  
 25 obviously spoke with him, and there hasn’t been an issue so far.” (Id. at 224.) The trial court  
 26 denied the motion, noting that defense counsel can file a writ if he determines there is a basis to  
 27 do so. (Id. at 226.) The record contains no evidence that counsel knew or should have known of  
 28 petitioner’s mental health history. See Dixon v. Ryan, 932 F.3d 789, 803 (9th Cir. 2019);

1 Williams v. Pliler, 171 F. App'x 688, 692 (9th Cir. 2006). The state court, therefore, was not  
2 objectively unreasonable in denying this Sixth Amendment claim.

3 10. Failure to Impeach Joey Padilla

4 Petitioner claims that a state's witness, Joey Padilla, was intoxicated during his testimony  
5 "yet defense counsel failed to exclude him as a witness." (ECF No. 1 at 31.) He also asserts that  
6 his counsel failed to impeach Padilla on his criminal record. (Id. at 31-32.)

7 First, as to petitioner's claim that Padilla was intoxicated during his testimony, petitioner  
8 has not identified any evidence to support his argument. As mentioned above, conclusory,  
9 unsupported statements do not warrant habeas relief.

10 Second, as to petitioner's claim that defense counsel was ineffective for failing to impeach  
11 a witness, this claim also fails. "Trial management is the lawyer's province," which includes  
12 deciding "what arguments to pursue, what evidentiary objections to raise, and what agreements  
13 to conclude regarding the admission of evidence." McCoy v. Louisiana, 138 S. Ct. 1500, 1508  
14 (2018) (citation omitted). Other decisions are reserved for the client, including "whether to plead  
15 guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." Id. Here,  
16 the state disclosed Padilla's criminal record to defense counsel. (ECF No. 27-4 at 3-4.) Despite  
17 his lengthy criminal record, the court and counsel identified one misdemeanor conviction from  
18 2005 that could be used for impeachment. (ECF No. 27-5 at 59-63.) Petitioner has not  
19 demonstrated that defense counsel's failure to impeach Padilla with this remote misdemeanor  
20 conviction constitutes deficient performance. Nor has he shown that this impeachment evidence  
21 could have reasonably resulted in a different outcome. See Davis v. Woodford, 384 F.3d 628,  
22 641-42 (9th Cir. 2004). This Court concludes that it was objectively reasonable for the state court  
23 to reject petitioner's claim for ineffective assistance of counsel on these grounds.

24 11. Failure to File Pretrial Motions

25 Petitioner asserts that his counsel failed or refused to prepare pretrial motions including  
26 change of venue based on media coverage, a gag order, a Pitchess motion, a Penal Code section  
27 995 motion, and a Penal Code section 1181 motion for a new trial or mistrial. (ECF No. 1 at 31.)

28 As stated above, to succeed on a Strickland claim for failing to file a motion, in addition to

1 showing the counsel was deficient and prejudicial, petitioner must show that “(1) had his counsel  
2 filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2)  
3 had the motion been granted, it is reasonable that there would have been an outcome more  
4 favorable to him.” Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (citing Kimmelman, 477  
5 U.S. at 373-75). Here, besides outlining which motions his counsel should have filed, petitioner  
6 provides no basis or facts to support this claim. Without evidentiary support, petitioner has failed  
7 to show that the trial court would have granted these motions as meritorious, or that, had the trial  
8 court granted the motions, the jury’s verdict would have been more favorable to him. Wilson,  
9 185 F.3d at 990. This Court finds that the state court’s rejection of this claim was not objectively  
10 unreasonable and recommends denying habeas relief.

11 12. Failure to call Character Witnesses

12 Next, petitioner asserts that his counsel failed to call character witnesses to explain that he  
13 does not usually drive drunk and monitored his condition due to a preexisting condition. (ECF  
14 No. 1 at 31.)

15 Counsel is not necessarily deficient for failing to include all arguments or evidence that  
16 would have supported the defense. See Yarborough v. Gentry, 540 U.S. at 7. “When counsel  
17 focuses on some issues to the exclusion of others, there is a strong presumption that he did so for  
18 tactical reasons rather than through sheer neglect.” Id. at 8. Based on the record here, the state  
19 court could reasonably conclude that petitioner has failed to rebut that presumption for a few  
20 reasons. First, petitioner does not identify exactly what the witnesses’ testimony would have  
21 been. Vague, unsupported assertions do not warrant habeas relief. See Greenway, 856 F.3d at  
22 680; Borg, 24 F.3d at 26. Second, defense counsel took steps to limit any bad propensity  
23 evidence and, as a result, may have made the tactical decision to avoid calling attention to any  
24 character evidence. (See, e.g., ECF No. 27-5 at 33-34.) Third, petitioner testified that because of  
25 his previous DUI, he tries not to get drunk when he needs to drive. (ECF No. 27-6 at 62; see also  
26 at 59-62, 84 (testifying that he smokes or ingests medicinal marijuana for his bad back.)) Lastly,  
27 defense counsel submitted character statements in mitigation for sentencing. (ECF No. 27-27 at  
28 33-43.)

13. Coercion into Testifying Against Petitioner's Will

Petitioner claims that counsel coerced him into testifying and forced him to limit his answers to "yes" or "no." (ECF No. 1 at 31.) He also states that the trial court reinforced this mandate by ordering petitioner to limit his responses or be removed from the courtroom. (*Id.*)

The decision to testify on one's own behalf is reserved for the accused. *McCoy*, 137 S. Ct. at 1508. But here, the record offers no support for petitioner's claim. *See, e.g., Reumont v. Ylst*, No. 92-55700, 1993 WL 77217, at \*5 (9th Cir. 1993). Petitioner provided thorough responses during his testimony, including that he was driving in his lane when the accident occurred. (ECF No. 27-6 at 58-94.) This testimony was helpful to defense counsel's theory of the case. (*Compare id.* at 92-94 *with id.* at 200-02.) The record contains no evidence that petitioner did not want to testify or that he was being coerced to only use one word answers. Plaintiff cites one record excerpt, but it does not support his argument that the trial court asked him to limit his responses or be removed from the courtroom. Instead, it shows that the trial court admonished him for asking questions to the prosecutor during cross-examination. (ECF No. 27-6 at 93 ("Mr. McCavitt, don't ask questions. Okay? ... Just answer his questions. Your attorney will ask you questions if he wants to clarify something. Okay?")) Based on the record, this Court finds that it was not objectively unreasonable for the state court to deny petitioner's claim.

14. Failure to Exclude Jury Member

Lastly, petitioner argues that defense counsel failed to exclude for cause a jury member whose brother was killed in a DUI accident. (ECF No. 1 at 31.) He alleges that counsel refused his request to have the jury member removed. (*Id.*) In response, respondent argues that defense counsel's performance was neither deficient nor prejudicial. (ECF No. 24 at 67.)

This claim fails. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Id.* Defense counsel's failure to inquire beyond the court's voir dire does not make his performance deficient. *See Floyd v. Filson*, 949 F.3d 1128, 1143 (9th Cir. 2020); *Wilson*, 185 F.3d at 991 (holding that counsel's decision not to inquire

about certain topics in voir dire given the jurors’ commitment to remain impartial “merits deference as a tactical decision”). Furthermore, establishing prejudice “in the context of juror selection requires a showing that, as a result of trial counsel’s failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased.” Davis v. Woodford, 384 F.3d 628, 643 (9th Cir. 2004); see also Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011); United States v. Quintero-Barraza, 78 F.3d 1344, 1349 (9th Cir. 1995). Petitioner has not provided any evidence that this juror harbored bias towards him. The trial court instructed the jury to base the verdict “only the evidence presented during the trial in this court and the law as I provide it to you.” (ECF No. 27-3 at 55; see also ECF No. 27-6 at 123 (“Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is [] not limited to, bias for or against the witnesses, attorneys, defendants, or alleged victims, based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, or socioeconomic status.”)) It is axiomatic that a jury is presumed to follow the trial court’s instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000). There is no evidence to rebut that presumption here. This Court finds that the state court’s denial of this claim was not objectively unreasonable and recommends denying habeas relief on this claim.

#### G. Judicial Bias (Claim Seven)

Petitioner claims that the trial judge had a potential bias against petitioner, evidenced by (1) not excusing the potential juror whose brother was killed in the DUI accident, (2) excluding the victim’s toxicology report, (3) admitting propensity evidence, (4) failing to issue a gag order on media coverage of the trial, and (4) providing misleading jury instructions on what constitutes inherent dangerousness to human life. (ECF No. 1 at 33.) In response, respondent argues that the California Supreme Court’s rejection of these claims was reasonable. (ECF No. 24 at 68-69.)

The Constitution protects a person’s right to an “impartial and disinterested tribunal in both civil and criminal cases.” Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). A petitioner claiming judicial bias must overcome the “presumption of honesty and integrity” on behalf of the judge. See Withrow v. Larkin, 421 U.S. 35, 47 (1975). In particular, “judicial rulings alone

1 almost never constitute a valid basis for a bias or partiality motion.” Liteky v. United States, 510  
2 U.S. 540, 555 (1994). “[O]pinions formed by the judge on the basis of facts introduced or events  
3 occurring in the course of the current proceedings, or of prior proceedings, do not constitute a  
4 basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism  
5 that would make fair judgment impossible.” Id. “A judge’s ordinary efforts at courtroom  
6 administration—even a stern and short-tempered judge’s ordinary efforts at courtroom  
7 administration—remain immune.” Id. at 556.

8 The Supreme Court has identified only three circumstances where the appearance of bias  
9 warrants recusal: (1) the judge has a financial interest in a case’s outcome; (2) the judge has a  
10 conflict arising from his participation in an earlier proceeding; and (3) the judge becomes  
11 “embroiled in a running, bitter controversy” with one of the litigants. Caperton v. A.T. Massey  
12 Coal Co., 556 U.S. 868, 877-80 (2009); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); see  
13 also Crater v. Galaza, 491 F.3d 1119, 1131 (9th Cir. 2007). Petitioner’s challenges do not fall  
14 into any of these three categories. Instead, he merely complains about the outcomes of ordinary  
15 courtroom proceedings. Such challenges are “proper grounds for appeal, not for recusal.”  
16 Liteky, 510 U.S. at 555. The state court’s rejection of petitioner’s judicial bias claim was not  
17 objectively unreasonable, and this Court recommends denying habeas relief on claim seven.

#### 18 H. Prosecutorial Misconduct (Claim Eight)

19 Petitioner claims that the prosecutor committed misconduct in the following ways:  
20 (1) violated verbal commitment not to impeach petitioner with prior speeding infractions; (2)  
21 improper impeachment with an alleged DUI that occurred more than five years ago and did not  
22 contain proper signatures; (3) use of extremely inflammatory photographs of victim being  
23 removed from the vehicle; (4) abuse of preemptory challenges by trying to identify individuals  
24 willing to use “logic and common sense to decide the case”; (5) knowingly allowed an intoxicated  
25 witness to testify and illicit fabricated testimony; (6) secured Joey Padilla’s testimony through  
26 legal deal with his girlfriend; (7) destroyed or neglected to preserve exculpatory evidence; (8)  
27 colluding with accident reconstruction expert and reports; and (9) prosecutor “testified” for the  
28



1 victim in closing argument. (ECF No. 1 at 33-37.) In response, respondent argues that the state  
 2 court's rejection of these claims was not contrary to, or an unreasonable application of, clearly  
 3 established Supreme Court precedent. (ECF No. 24 at 69-83.) The California Supreme Court  
 4 summarily rejected petitioner's claim.

5 In reviewing the prosecutor's alleged misconduct, "[t]he relevant question is whether the  
 6 prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a  
 7 denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (Donnelly v.  
 8 DeChristoforo, 416 U.S. 637, 643 (1974)); see also Parker v. Matthews, 567 U.S. 37, 45 (2012)  
 9 (per curiam). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even  
 10 universally condemned.'" Darden, 477 U.S. at 181 (citation omitted). "[A] court should not  
 11 lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or  
 12 that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less  
 13 damaging interpretations." Donnelly, 416 U.S. at 647. In making its determination, the court  
 14 should consider the prosecutor's comments in the context of the entire trial record. Hein v.  
 15 Sullivan, 601 F.3d 897, 912-13 (9th Cir. 2010). "[T]he *Darden* standard is a very general one,"  
 16 and courts, therefore, have "more leeway . . . in reaching outcomes in case-by-case  
 17 determinations." Parker, 567 U.S. at 48 (quoting Alvarado, 541 U.S. at 664). Even if there was  
 18 prosecutorial misconduct, habeas relief is only warranted if petitioner can establish that the error  
 19 "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v.  
 20 Abrahamson, 507 U.S. 619, 637 (1993) (citation omitted); see also Parle v. Runnels, 387 F.3d  
 21 1030, 1044 (9th Cir. 2004).

#### 22 1. Impeachment with Speeding Infractions

23 Petitioner claims that the prosecutor violated a verbal commitment to defense counsel that  
 24 he would not impeach petitioner with prior speeding infractions. (ECF No. 1 at 34.) He contends  
 25 that the prosecutor broke this agreement, using El Dorado County speeding infractions to  
 26 impeach petitioner despite the fact that these infractions "were redacted and the jury [was]  
 27 instructed not to consider them." (Id.) Respondent disagrees, arguing that the record refutes  
 28 petitioner's claim. (ECF No. 24 at 71-74.)

After reviewing the record, this Court agrees with respondent that the record does not support petitioner's claim. Although defense counsel filed a motion in limine to exclude evidence of petitioner's prior speeding citations, ECF No. 27-1 at 81-83, prosecutor filed a motion in limine to admit this evidence, *id.* at 93, 104. The trial court heard argument on this issue and tentatively ruled that the evidence could be admitted with a limiting instruction. (ECF No. 27-3 at 23-29 ("And it's my understanding that the purpose that this is going to be offered is to show that Mr. McCavitt in the past has suffered adverse consequences as a result of speeding, that he therefore would appreciate the dangerousness and the recklessness of the unlawful conduct.")) During trial, the court twice overruled defense counsel's objections to admit evidence of petitioner's prior speeding infractions. (ECF No. 27-5 at 41-42; ECF No. 27-7 at 33.) Prosecutor cross examined petitioner about the speeding offenses. (ECF No. 27-6 at 89-92.) The trial court provided the following limiting instruction to the jury:

The People presented evidence that the Defendant committed other offenses that are not charged in this case, i.e., driving under the influence and speeding. You may consider this evidence only if the People have proved by a preponderance of the evidence that the Defendant committed the uncharged offenses.

...

If you decide that the Defendant committed the uncharged offenses, you may, but are not required to, consider that evidence of the limited purpose of deciding whether or not the Defendant, one, acted with implied malice; two, acted with gross negligence; and, three, acted [] to show his knowledge.

(ECF No. 27-6 at 135-36.) The jury is presumed to follow the instructions. *Weeks*, 528 U.S. at 234. Petitioner has not identified any record cites to support his claim that the prosecutor made an oral commitment not to use this evidence. An unsupported allegation is insufficient to warrant habeas relief. *Borg*, 24 F.3d at 26. This Court concludes that the state court's rejection of his claim was not objectively unreasonable and recommends denying this claim.<sup>3</sup>

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<sup>3</sup> Petitioner also takes issue with the redactions on the speeding tickets. Because petitioner agreed to admit the enhancement that he was out on bail when the accident occurred, the court approved the parties' request to redact portions of the tickets that reflect the outstanding charge. (ECF No. 27-6 at 118-19.)

1           2. Impeachment with Prior DUI Conviction

2           Next, petitioner states that prosecutor erred by using his prior DUI that was more than five  
3 years old and without proper signatures. (ECF No. 1 at 34.) The relevant prior DUI occurred in  
4 2006 in Hawaii, and petitioner admitted to the charges. (ECF No. 27-36 at 168-71.)

5           After reviewing the record, this Court concludes that the state court's rejection of  
6 petitioner's claim was not objectively unreasonably. Defense counsel filed a motion in limine to  
7 exclude the prior DUI conviction while prosecutor requested to admit it. (ECF No. 27-1 at 80-81,  
8 93.) The trial court heard argument and tentatively ruled that the prior DUI conviction was  
9 admissible. (ECF No. 27-3 at 21-23.) During trial, the parties stipulated that petitioner had a  
10 prior DUI and agreed to a limiting instruction that the evidence was relevant to petitioner's  
11 knowledge of effects of driving under the influence. (ECF No. 27-5 at 33-34.) The trial court  
12 gave the following limiting instruction:

13           Ladies and gentlemen, we have certain rules of evidence, and one of the  
14 rules of evidence is that some prior issues cannot be considered for  
15 purposes of showing an individual's propensity to commit an existing act.  
16 In other words, you cannot consider the fact that Mr. McCavitt was  
17 convicted of DUI in Hawaii to conclude that, well, he must have been  
18 DUI in this particular case. You can, however, consider the effect of that  
19 conviction with respect to the classes that he took as to his knowledge of  
20 the dangerousness or the consequences of driving while intoxicated. So  
21 you can't simply conclude that, well, he did it before, so he must have  
22 done it this time. But you can use the information from the class and from  
23 the conviction to consider whether or not Mr. McCavitt had knowledge of  
24 the dangerousness and the consequences of driving while impaired.

25           (ECF No. 27-5 at 43.) To the extent petitioner is now contesting the authenticity of the prior DUI  
26 conviction records, this challenge fails. The cited records contain his signatures, and petitioner  
27 does not specify which signatures are missing. (ECF No. 27-36 at 168-71.) Without more  
28 evidence, an unsupported statement does not warrant habeas relief.

          To the extent that petitioner challenges the admission of this evidence under state law,  
habeas relief is unavailable. This issue is a matter of state law and is not cognizable on habeas  
review. See Estelle, 502 U.S. at 67-68; Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir.

2009); see also Horton v. Mayle, 408 F.3d 570, 576 (9th Cir. 2005). Errors of state law do not warrant federal habeas relief. See Estelle, 502 U.S. at 67-68; Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995). The erroneous admission of evidence is grounds for federal habeas corpus relief only if it made the state proceedings so fundamentally unfair as to violate due process. See Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991).

Assuming the claim is cognizable, “[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by ‘clearly established Federal law,’ as laid out by the Supreme Court.” Holley, 568 F.3d at 1101; see also Walden v. Shinn, 990 F.3d 1183, 1204 (9th Cir. 2021); Nava v. Diaz, 816 F. App’x 192, 193 (9th Cir. 2020). Because the Supreme Court has not clearly decided whether the admission of prior DUI conviction for knowledge of effects of drunk driving constitutes a due process violation sufficient to warrant habeas relief, this Court cannot conclude that the state court’s ruling was contrary to, or an unreasonable application of, clearly established federal law. See Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam); Jennings v. Runnels, 493 F. App’x 903, 906 (9th Cir. 2012); Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006); Bradford v. Paramo, No. 2:17-cv-05756 JAK JC, 2020 WL 7633915, at \*6-7 (C.D. Cal. Nov. 12, 2020) (citing cases), adopting report and recommendation, 2020 WL 7631441 (C.D. Cal. Dec. 22, 2020). Even if the petitioner managed to surpass the clearly established law issue, given the trial evidence summarized above, the admission of his prior DUI conviction did not have a substantial and injurious effect on the jury’s verdict. Brecht, 507 U.S. at 623. This Court determines that the state court’s decision was reasonable and recommends finding that relief is unavailable on this claim.

### 3. Inflammatory Photos of Victim

Petitioner argues that the “prosecution used extremely inflammatory photographs of the victim being removed from the vehicle, claiming they were being used to lay the foundation for future testimony” but failed to do so. (ECF No. 1 at 34.)

After reviewing the record, this Court concludes that petitioner’s claim lacks merit. During trial, the prosecutor told the court that he was “attempting to have this officer lay the

1 foundation for some photographs” and requested that they be admitted into evidence and  
2 published before the jury. (ECF No. 27-3 at 136.) Defense counsel objected to some  
3 photographs that showed the victim in the vehicle. (Id. at 137.) In response, the prosecutor  
4 provided the following explanation:

5 [S]ome of those pictures are being introduced because we’re going  
6 to have a reconstruction expert on tomorrow. One of the things he’s  
7 going to base his opinion on is not only damage to the vehicles but  
also injuries to persons involved in the vehicles.

8 We’re trying to show the best collision dynamics we can. Obviously,  
9 in any vehicle accident, there are gruesome photos. We tried to pick  
10 out the cleanest ones we could ahead of time. There are 100 photos  
that are worse than the ones that the Court is looking at that we’re  
not seeking to introduce. So we attempted to cull through those pretty  
well just to get to this point.

11 (Id. at 137-38.) The trial court admitted some and excluded others. (Id. at 138-41.) During trial,  
12 an officer testified that the photos accurately depicted the scene. (Id. at 179-81.) The accident  
13 reconstruction expert testified that he partially relied upon scene photographs to complete his  
14 investigation. (ECF No. 27-5 at 94, 144.) To the extent petitioner is attempting to challenge the  
15 state court’s admission of these photographs, the state court’s determination that this evidence  
16 was admissible is binding on this federal habeas court. See Estelle, 502 U.S. at 67-68. This  
17 Court concludes that the state court’s rejection of this claim was reasonable and recommends  
18 denying habeas relief.

#### 19 4. Use of Peremptory Challenges

20 Next, petitioner claims that prosecutor abused his peremptory challenges by using  
21 deceptive tactics to “identify persons willing to use logic and common sense to decide the case.”  
22 He provides an example of a potential juror who identified herself a mathematician.

23 The prosecution presented her with an illogical question that defied  
24 basic mathematical [principles] followed by the supposition that if  
25 the law said the opposite of what she knew to be factually correct  
26 what would she say. She, obviously, said the law would be wrong  
27 and needed to be changed. Then she followed with a question of her  
own, something to the effect that shouldn’t this be a vehicular  
manslaughter charge. He thereupon dismissed her rather than rely on  
the Court to instruct her on the law.

28 (ECF No. 1 at 34-35.)

The Supreme Court has only identified one substantive control over the use of a peremptory challenge. Specifically, the Equal Protection Clause of the Fourteenth Amendment prohibits litigators from exercising peremptory challenges on the basis of race. Batson v. Kentucky, 476 U.S. 79, 86 (1986); see also People v. Wheeler, 22 Cal. 3d 258 (1978). To determine whether a peremptory strike was discriminatory, courts apply a three-part inquiry:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Davis v. Ayala, 576 U.S. 257, 270 (2015) (quoting Snyder v. Louisiana, 552 U.S. 472, 476–77 (2008)). Although peremptory challenges reinforce a defendant's right to an impartial jury, "we have long recognized, as well, that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension." United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000).

Here, petitioner does not claim that the prosecutor used peremptory challenges on the basis of race. Even if he did, petitioner must establish a prima facie case of racial discrimination. Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam). There is no evidence to support that position, and the voir dire transcripts are not available for this court to consider on habeas review. (ECF No. 35.) The state court's denial of this claim was not objectively reasonable and habeas relief is not warranted.

##### 5. Use of Intoxicated Witness to Fabricate Testimony

Petitioner argues that the prosecutor knowingly placed an intoxicated witness on the stand to present fabricated testimony and then reinforced this testimony "with the knowingly false testimony that the responding deputy took the petitioner out of his truck from the passenger side, testimony obviously refuted by the dash-cam video showing the passenger side of the truck with completely pulverized." (ECF No. 1 at 36.)

"[A] conviction obtained by the knowing use of perjured testimony is fundamentally

1 unfair, and must be set aside if there is any reasonable likelihood that the false testimony could  
2 have affected the judgment of the jury.” United States v. Agurs, 427 U.S. 97, 103 (1976)  
3 (footnotes omitted); see Napue v. Illinois, 360 U.S. 264, 269 (1959). To state a successful claim,  
4 petitioner must show that (1) the testimony was false, (2) the prosecutor knew or should have  
5 known that the testimony was false, and (3) the false testimony was material. United States v.  
6 Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003); see also Hayes v. Brown, 399 F.3d 972, 984 (9th  
7 Cir. 2005) (en banc). A witness testifying under oath commits perjury if the witness “gives false  
8 testimony concerning a material matter with the willful intent to provide false testimony, rather  
9 than as a result of confusion, mistake, or faulty memory.” United States v. Dunnigan, 507 U.S.  
10 87, 94 (1993).

11 Petitioner’s challenges regarding the two witnesses’ testimony fails. First, he claims that  
12 the prosecutor knew Joey Padilla was drunk and testified falsely. As stated above, there is no  
13 evidence to support his claim that the prosecutor knew Padilla was drunk or that the testimony  
14 was false. Even if petitioner could prove those elements, he has not shown that the testimony was  
15 material. Second, petitioner claims that an officer falsely testified that he removed petitioner  
16 from the passenger side of the truck. (ECF No. 27-3 at 81.) Assuming that this testimony was  
17 false, and the prosecutor should have known it was false, this testimony was not material.  
18 Petitioner even claims that the testimony was refuted by the dash-cam video. (See, e.g., ECF No.  
19 1 at 35.) Furthermore, how petitioner was extracted from his truck after the collision has no  
20 bearing on whether he committed the charged offenses. Because fairminded jurists could  
21 reasonably agree that the prosecutor did not knowingly use false testimony to secure a conviction,  
22 habeas relief is not warranted.

#### 23 6. Legal Deal to Secure Witness Testimony

24 Petitioner also claims that the prosecution made a secret deal with Joey Padilla to secure  
25 his testimony. Specifically, he claims the prosecutor promised to reduce criminal charges against  
26 Joey Padilla’s girlfriend in exchange for Padilla’s testimony in this case. (ECF No. 1 at 35-36.)  
27 Although the prosecutor informed defense counsel of the deal during a trial recess, petitioner now  
28 states that this conversation should have been confirmed before the court. (Id.) This claim lacks



merit. Petitioner has not identified nor is this Court aware of any evidence to support his claim. Conclusory allegations that are not supported by statements of fact do not warrant habeas relief. Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995); Borg, 24 F.3d at 26. This Court recommends denying relief on this claim as well.

#### 7. Failure to Preserve Exculpatory Evidence

Petitioner argues that the prosecutor “destroyed, caused to be destroyed or neglected to secure exculpatory evidence in order to bolster his own case in chief.” (ECF No. 1 at 36.) He provides the following three examples: (1) failed to produce the Subaru’s black box, (2) failed to preserve petitioner’s blood sample for additional testing, and (2) presented misleading breathalyzer logs. (Id.) This challenge merely restates arguments petitioner raised above. For the same reasons previously discussed, there is insufficient evidence to support petitioner’s assertion that these examples amount to prosecutorial misconduct.

#### 8. Colluding with Accident Reconstruction Expert

Next petitioner claims that there was a possibility of collusion because the accident reconstruct report and testimony was based on the police reports rather than independent scientific work. (ECF No. 1 at 36.) This claim also merely restates an earlier argument. After reviewing the evidence, this Court concludes that Mr. Snook’s testimony and report was based on several sources including Officer Nett’s traffic collision report, Officer Hoey’s traffic collision report, photographs taken by CHP officers, both vehicles, and Mr. Snook’s own dynamics analysis. (See, e.g., ECF No. 27-5 at 93-98.) Petitioner has failed to identify any evidence to support his collusion theory and, therefore, relief is not warranted.

#### 9. Improper Closing Argument

Lastly, petitioner claims that the prosecutor improperly testified for the victim during closing arguments when he explained why the victim did not use her brakes or her thoughts upon seeing petitioner’s headlights before the collision. (ECF No. 1 at 36-37.)

This Court concludes that the state court’s rejection of petitioner’s claim was not objectively unreasonable. Closing arguments are “seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear.”

1 Donnelly, 416 U.S. at 646-47. The Supreme Court has cautioned that “a court should not lightly  
2 infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a  
3 jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging  
4 interpretations.” Id. at 647. “Prosecutors and defense lawyers are given ‘wide latitude’ in closing  
5 arguments.” Hein, 662 F.3d at 538 (citation omitted). Here, in closing arguments, the prosecutor  
6 argued “[t]he bright lights were on. Last thing Denise Caldwell saw were those bright lights. She  
7 slowed her vehicle down. She tried to get to the right part of her lane.” (ECF No. 27-6 at 177.) In  
8 rebuttal closing arguments, the prosecutor argued “[s]he’s going slow. 10 or 15? I don’t know.  
9 That’s what the witnesses say. We know from physics she’s going about 6 or 7 miles an hour.” (Id.  
10 at 208.) He explained that the victim didn’t slam on her brakes because petitioner was going too  
11 fast, and her last thoughts must have been wondering what was going on while staring into  
12 petitioner’s headlights. (Id.) In the context of the trial record, these comments did not infect the  
13 trial with unfairness to constitute a denial of due process. Prosecutor’s closing remarks are based  
14 on evidence regarding the speed of the victim’s car and the position of the cars before impact. To  
15 mitigate any chance of error, the trial court also instructed the jury that “[n]othing the attorneys say  
16 is evidence.” (ECF NO. 27-6 at 126 (“In their opening statements and closing arguments, the  
17 attorneys discuss the case, but their remarks are not evidence.”)) The state court’s rejection of  
18 petitioner’s prosecutorial misconduct claim was not objectively unreasonable, and this Court  
19 recommends denying habeas relief.

20 I. Cruel and Unusual Punishment Claim (Claim Nine)

21 Finally, petitioner claims that his sentence constitutes cruel and unusual punishment under  
22 the Eighth Amendment. (ECF No. 1 at 37-39.) In response, respondent argues that a fairminded  
23 jurist could agree with the state court’s rejection of this claim. (ECF No. 24 at 83-85.)

24 The Eighth Amendment states “[e]xcessive bail shall not be required, nor excessive fines  
25 imposed, nor cruel and unusual punishments inflicted.” “The final clause prohibits not only  
26 barbaric punishments, but also sentences that are disproportionate to the crime committed.”

27 Solem v. Helm, 463 U.S. 277, 284 (1983). Courts are guided by objective factors in determining  
28

1 whether a sentence is cruel and unusual punishment, including “(i) the gravity of the offense and  
2 the harshness of the penalty; (ii) the sentences imposed on other criminals in the same  
3 jurisdiction; and (iii) the sentences imposed for commission of the same crime in other  
4 jurisdictions.” Helm, 463 U.S. at 292. Although Supreme Court jurisprudence in this area has  
5 been unclear, “one governing legal principle emerges as ‘clearly established’ under § 2254(d)(1):  
6 A gross disproportionality is applicable to sentences for terms of years.” Lockyer v. Andrade,  
7 538 U.S. 63, 72 (2003). The gross disproportionality principle is only triggered in the  
8 “exceedingly rare” and “extreme” case. Id.; Ewing v. California, 538 U.S. 11, 23 (2003) (“The  
9 Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it  
10 forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”)

11 This Court concludes that the state court’s rejection of petitioner’s cruel and unusual  
12 punishment claim was not objectively unreasonable. Petitioner was convicted of second degree  
13 murder and gross vehicular manslaughter while intoxicated. (ECF No. 27-2 at 80-81.) The trial  
14 court sentenced him to 17 years in state prison. (ECF No. 27-2 at 193-95.) This sentence is not  
15 grossly disproportionate to his crimes. See Ewing, 538 U.S. at 30 (affirming sentence for 25  
16 years under three strikes law for shoplifting three golf clubs); Hutto v. Davis, 454 U.S. 370, 372  
17 (1982) (per curiam) (affirming sentence to two consecutive terms of 20 years for possession with  
18 intent to distribute nine ounces of marijuana and distribution of marijuana); Rummel v. Estelle,  
19 445 U.S. 263, 265-66, 285 (1980) (affirming life without parole sentence under recidivist statute  
20 for obtaining \$120.75 by false pretenses). Courts have concluded that a life sentence for murder  
21 is not cruel and unusual punishment. See, e.g., Solem, 463 U.S. at 290, n.15; Harris v. Wright, 93  
22 F.3d 581, 585 (9th Cir. 1996) (stating that mandatory life imprisonment without parole “[l]ike any  
23 other prison sentence, [] raises no inference of disproportionality when imposed on a murderer”);  
24 United States v. LaFleur, 971 F.2d 200, 211 (9th Cir. 1991) (“Under Harmelin, it is clear that a  
25 mandatory life sentence for murder does not constitute cruel and unusual punishment.”)  
26 Logically then, a sentence for 15 years for second degree murder and gross vehicular  
27 manslaughter plus 2 years for out-on-bail enhancement does not run afoul with the Eighth  
28 Amendment. Habeas relief is not warranted for this claim either.

1 VI. Request for Judicial Notice

2 In reply to respondent's answer, petitioner filed a request for judicial notice. (ECF No.  
3 30.) He requests that this Court take judicial notice of exhibits attached to his reply and his  
4 habeas petition. (Id. at 10.) Federal Rule of Evidence 201(b) provides that a federal court may  
5 take judicial notice of an adjudicative fact "that is not subject to reasonable dispute" if the fact  
6 "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and  
7 readily determined from sources whose accuracy cannot reasonably be questioned." Petitioner  
8 has not explained how these exhibits satisfy this standard. To the extent that petitioner now  
9 presents new evidence, this Court may only review the record that was before the state court  
10 when it adjudicated the habeas claims on the merits. Cullen v. Pinholster, 563 U.S. 170, 185  
11 (2011). To the extent that petitioner's exhibits are excerpted from the record, this Court has  
12 considered the entire record in evaluating the pending petition and need not take judicial notice of  
13 these exhibits to do so. This Court denies petitioner's request for judicial notice.

14 VII. Conclusion

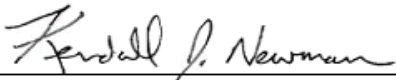
15 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of  
16 habeas corpus (ECF Nos. 1 & 8) be denied.

17 Furthermore, IT IS HEREBY ORDERED that petitioner's request for judicial notice (ECF  
18 No. 30) be denied.

19 These findings and recommendations are submitted to the United States District Judge  
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
21 after being served with these findings and recommendations, any party may file written  
22 objections with the court and serve a copy on all parties. Such a document should be captioned  
23 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections,  
24 he shall also address whether a certificate of appealability should issue and, if so, why, and as to  
25 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the  
26 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.  
27 § 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after  
28 service of the objections. The parties are advised that failure to file objections within the

1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
2 F.2d 1153 (9th Cir. 1991).

3 Dated: November 30, 2022

4   
5 KENDALL J. NEWMAN  
6 UNITED STATES MAGISTRATE JUDGE

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